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Supreme Court, U.S.
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CASE NO.

in the

Supreme Court of the United States

OCTOBER TERM, 1986

RONALD ARTHUR OFSHE

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

On Petition For A Writ Of Certiorari To The United States Court Of Appeals, Eleventh Circuit

BRIEF OF PETITIONER ON JURISDICTION

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QUESTIONS PRESENTED

I.

WHETHER PREJUDICE SHOULD BE PRESUMED WHEN THE INVASION OF THE ATTORNEY-CLIENT RELATIONSHIP CONSISTS OF THE GOVERNMENT ITSELF CREATING A CONFLICT BY TURNING A DEFENSE ATTORNEY INTO A GOVERNMENT INFORMANT AGAINST HIS OWN CLIENT AT A TIME WHEN THAT ATTORNEY IS REPRESENTING THE CLIENT IN A PENDING CRIMINAL CASE?

II.

WHETHER IT IS OUTRAGEOUS GOVERNMENT MISCONDUCT WHEN A PROSECUTOR USES A DEFENSE ATTORNEY AS A CONFIDENTIAL INFORMANT AGAINST HIS CLIENT WHILE THAT DEFENSE ATTORNEY IS REPRESENTING THAT CLIENT IN A PENDING CRIMINAL PROSECUTION?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
OPINION BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3

TABLE OF CONTENTS—(Continued)

Page

REASONS FOR GRANTING THE WRIT 8

IT IS IMPERATIVE THAT THE SANCTION OF DISMISSAL BE PRESCRIBED AS THE REMEDY TO DETER PROSECUTORS FROM CONVERTING DEFENSE ATTORNEYS INTO INFORMANTS AGAINST THEIR OWN CLIENTS. THIS QUESTION SHOULD BE DECIDED BECAUSE IT IS VITAL TO ALL CLIENTS' RELIANCE UPON THE INDEPENDENCE AND LOYALTY OF DEFENSE COUNSEL. THE PAUCITY OF SUPREME COURT DECISIONS DEFINING OUTRAGEOUS GOVERNMENTAL MISCONDUCT LEAVES LOWER COURTS WITHOUT GUIDANCE.

UNDER THE FACTS OF THIS CASE, THE COURT OF APPEALS MADE AN ERRONEOUS APPLICATION OF LAW IN REQUIRING A DEMONSTRATION OF PREJUDICE BY THE DEFENDANT WHEN HIS COUNSEL IS LADEN WITH CONFLICTS CREATED BY THE GOVERNMENT.

CONCLUSION 13

TABLE OF AUTHORITIES

	Page
Cuyler v. Sullivan, 446 U.S. 335 (1980)	11
Strickland v. Washington, 466 U.S. 693 (1984)	9, 10, 11
United States v. Crow Dog, 532 F.2d 1182 (8th Cir. 1976)	12
United States v. Harnage, ___ F.Supp. ___, Case No. 86-CR-239 (D.Col. June 10, 1987)	9
United States v. Houghton, 554 F.2d 1219 (1st Cir. 1977)	12
United States v. McCord, 509 F.2d 334 (D.C. Cir. 1974)	12
United States v. Morrison, 449 U.S. 361 (1981)	7, 10, 11
United States v. Ofshe, 817 F.2d 1508 (11th Cir. 1987)	2
Weatherford v. Bursey, 429 U.S. 545 (1977)	11

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On Petition For a Writ of Certiorari To The United States Court of Appeals, Eleventh Circuit

BRIEF OF PETITIONER ON JURISDICTION

Petitioner, Ronald Arthur Ofshe, respectfully prays that a writ of certiorari issue to review the judgment, opinion, and order on rehearing of the United States

Court of Appeals for the Eleventh Circuit entered in Case No. 86-5351, on June 1, 1987 and July 9, 1987, which affirmed the judgment of conviction and sentence of the United States District Court of the Southern District of Florida.

OPINION BELOW

The opinion of the United States Court of Appeals, Eleventh Circuit, denying the defendant's direct appeal is reported as *United States v. Ofshe*, 817 F.2d 1508 (11th Cir. 1987). (A. 1).[1] The order of the Magistrate denying the defendant's Motion to Dismiss Indictment for Violations of Due Process and Right to Counsel, as adopted by the trial court, is unreported. That order is reprinted in the Appendix to this Petition. (A. 24-41).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to the provisions of Rule 17(a) and (c) of the Rules of the Supreme Court and 28 U.S.C. §1254(1). This petition is filed within the authorized time period following the Eleventh Circuit's Order on Rehearing. See Supreme Court Rule 20.1 and 20.4.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fifth Amendment:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

[1]The symbol "A" is used to designate the Appendix to this Petition.

United States Constitution, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

A Superceding Indictment was filed on March 13, 1985. (R-1-57).[2] A Motion to Dismiss Indictment for Violations of Due Process and Right to Counsel and Memorandum of Law was filed on July 15, 1985. (R-1-76-77).

An evidentiary hearing on the Motion to Dismiss for Violations of Due Process and Right to Counsel was held on October 5, 1985. The Magistrate recommended denial of the Motion to Dismiss in a Review and Recommendation. (R-2-87). The defendant filed a Petition to Set Aside the Magistrate's Review and Recommendation. (R-2-90). The District Judge entered an Order Affirming and Adopting Review and Recommendation, which was filed on December 9, 1985. (R-21-89). The defendant entered a conditional plea on February 11, 1986, reserving the right to appeal the denial of his Motion to Dismiss. (R-2-99). A timely Notice of Appeal was filed on May 19, 1986. (R-2-101).

The facts giving rise to the Motion to Dismiss for Violations of Due Process and Right to Counsel are set

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[2]The record references in this Petition are to the Record on Appeal which was before the Eleventh Circuit and which has been returned to the United States District Court for the Southern District of Florida. This record is available for transmittal to this Court should the Court so order.

forth in some detail in the opinion of the United States Court of Appeals, 817 F.2d 1508 (11th Cir. 1987).

In February, 1983, the defendant, already represented by Florida counsel, retained Marvin Glass as co-counsel. Mr. Glass was, at that time, an attorney practicing in Chicago, Illinois. (SR-1-108). Glass assumed a *lead* counsel position with respect to communications with the prosecution and plea negotiations. (SR-1-108). As noted by the Magistrate, Glass directed the actions of co-counsel as to certain pretrial tactics and strategy, including continuance of trial, waiver of speedy trial, and waiver of indictment. Co-counsel obeyed these directions. (A-29).

Around April 19, 1983, at the same time he was counsel for Ronald Ofshe, Marvin Glass learned that he was the target of a Chicago federal investigation regarding a continuing criminal enterprise. In an effort to avoid indictment altogether, or at least to reduce his own criminal liability, Glass offered to cooperate with the United States Attorney in Chicago in identifying and investigating suspected drug traffickers. (SR-1-47-53). Glass, on or about June 8, 1983, told Assistant United States Attorney Scott Turow and the FBI agents from Chicago that he was currently representing Ofshe in a federal case in Florida, that Ofshe spoke to him about a money-laundering scheme, and that Ofshe had requested Glass to find a buyer for "a ton of marijuana." (SR-1-57-59). The FBI agents from Chicago, acting on instructions from the Chicago United States Attorney, went to Miami, Florida, in June of 1983 and placed a NAGRA body-bug on attorney Marvin Glass and conducted a surreptitious electronic surveillance of the conversation Glass had with his

client Ofshe on June 14, 1983. This conversation included general discussions about an introduction *Glass* wanted to arrange for Ofshe so that Ofshe could purchase marijuana on credit. The conversation also included a brief discussion of the timing and likelihood of success for Ofshe's motion to suppress in the pending Florida federal case. (R-1-76).

This surveillance was conducted without either knowledge or approval of the United States Attorney's Office for the Southern District of Florida. Indeed, the only approval had been secured from the United States Attorney for the Northern District of Illinois. The Government knew that Marvin Glass was acting as Ofshe's attorney at the time of the body recording but decided to undertake the electronic surveillance regardiess.

Attorney Glass was not told at the time of the electronic surveillance that he had to withdraw from the representation of Ofshe. (SR-1-65). Prosecutor Turow acknowledged that he did not tell Mr. Glass to withdraw prior to June 14, the date of the electronic surveillance. (SR-1-65-66). Turow merely considered, but apparently did not communicate to Glass, whether Glass would be permitted to complete the investigation of Ofshe prior to withdrawing from representation of Ofshe. (SR-1-67). Glass told Turow that the pending case was about to be dismissed and later would be refiled. Turow did nothing to verify Glass' statement regarding the dismissal of the case. Indeed, the FBI agent learned from the tape recording of the surveillance that the case was active and pending imminent trial at the very same time that Glass was working as a confidential informant against his client, Ronald Ofshe. (R-1-76; SR-1-66-69).

It was not until August 30, 1983, some two and one-half months later, that the United States Attorney for the Northern District of Illinois instructed confidential informant Glass to withdraw as attorney for the petitioner. (SR-1-70). Only after August 30, 1983, was Glass repeatedly told to withdraw. Only when he still did not withdraw was the United States Attorney for the Southern District of Florida finally informed in November, 1983 of the conflict of counsel in the pending case. (SR-1-70).

In February, 1984, Judge Gonzalez, who was presiding over Ofshe's case, learned that Glass had been enlisted as an informant against his client. That Judge then ordered the United States Attorney to disclose this fact to the defendant. *Glass* appealed Gonzalez' decision, and did not move to withdraw until April, 1984. Even then, he continued to hide the fact that he was working as an informant, with Governmental consent, until February, *1985*. Since the Court file was sealed pending Glass' appeal, defendant Ofshe could not discover the reasons for Glass' withdrawal or even the fact that an appeal taken by Glass. 817 F.2d at 1511. After the disclosure of the actions of the informant/attorney Glass to the defendant in February, 1985, the defendant filed a Motion to Dismiss, which is the subject matter of this Petition.

The Court of Appeals rejected the defendant's contention that the governmental conduct was so outrageous as to require dismissal under the Fifth Amendment. The Court held:

> After considering the totality of the circumstances presented in the case, we hold

> that the actions of the government were not so outrageous as to 'shock the universal sense of justice.' Therefore, the district court's denial of the motion to dismiss is affirmed. In reaching this decision, however, we must stress two points. First, our holding is based upon the unique facts of this case. Second, we do not condone the government's use of criminal defense attorneys as informants against their clients.

In a footnote, the court noted that while they did not find the government's conduct sufficiently outrageous to warrant the dismissal of the Indictment,

> we do believe that Glass' and Turow's conduct was reprehensible. Because the district judge is more familiar with the attorneys' conduct, we assume he will refer this matter this matter to The Attorney Registration and Disciplinary Commission . . . .

The Court of Appeals, in its discussion of the Fifth Amendment issue, emphasized that the conduct of the investigation was designed to obtain information regarding Ofshe's subsequent criminal conduct and not used to *discover* defense strategy in the Florida case. The Court further found that, because Florida *co*-counsel provided zealous representation, Ofshe was not prejudiced in his defense.

Likewise, in rejecting the contention that the indictment should be dismissed because of the invasion of the attorney/client privilege, the Court noted that this Court's opinion in *United States v. Morrison,* 449 U.S.

361 (1981) squarely held that, absent demonstrable prejudice, dismissal was inappropriate as a remedy for such a Sixth Amendment violation. The Court of Appeals found no demonstrable prejudice.

REASONS FOR GRANTING CERTIORARI

IT IS IMPERATIVE THAT THE SANCTION OF DISMISSAL BE PRESCRIBED AS THE REMEDY TO DETER PROSECUTORS FROM CONVERTING DEFENSE ATTORNEYS INTO INFORMANTS AGAINST THEIR OWN CLIENTS. THIS QUESTION SHOULD BE DECIDED BECAUSE IT IS VITAL TO ALL CLIENTS' RELIANCE UPON THE INDEPENDENCE AND LOYALTY OF DEFENSE COUNSEL. THE PAUCITY OF SUPREME COURT DECISIONS DEFINING OUTRAGEOUS GOVERNMENTAL MISCONDUCT LEAVES LOWER COURTS WITHOUT GUIDANCE.

UNDER THE FACTS OF THIS CASE, THE COURT OF APPEALS MADE AN ERRONEOUS APPLICATION OF LAW IN REQUIRING A DEMONSTRATION OF PREJUDICE BY THE DEFENDANT WHEN HIS COUNSEL IS LADEN WITH CONFLICTS CREATED BY THE GOVERNMENT.

1. This Court has not heretofore commented on the limits of acceptable prosecutorial conduct in recruiting a *defense* attorney to be an informant against his own client while the attorney is actively representing the

client in a pending case. Although the court of appeals indicated that it would not "condone" such conduct, it provided no remedy to deter future prosecutors from that conduct. This case is not an isolated incident where prosecutors recruited defense attorneys as informants against their own clients. See *United States v. Harnage*, ____ F.Supp. ____, Case No. 86-Cr-239 (D.Col. June 10 1987). If prosecutors are free to use defense attorneys as informants against their clients, irreparable and fatal damage will be done to the delicate balance between the functions of the defense and the prosecution in making the criminal justice system work. A defendant's attorney has a clearly defined and crucial role in the administration of justice, to-wit: to provide advocacy to the citizen accused in the adversary system of trial. That role is literally destroyed when the defense attorney becomes an agent of the prosecution.

Additionally, such a prosecutorial practice does violence to the trust that the citizens of this country can posit in the attorney/client relationship. Given the magnitude of the shock waves which reach the very foundations of the court system, it is clear that such practice must be deemed outrageous.

2. *Strickland v. Washington*, 466 U.S. 693 (1984), was the landmark case addressing claims of ineffectiveness of counsel. In those general situations, *Strickland* required that the defendant make a preliminary showing of some prejudice. However, the *Strickland* opinion took care to distinguish general ineffectiveness claims of the type it was addressing from the different situations involving claims of ineffective assistance *based on a conflict of interest.* For purposes

of deciding claims of ineffectiveness of counsel, there is a presumption of prejudice when counsel had an actual conflict of interest.

> One type of actual ineffectiveness warrants a similar, though more limited, presumption of prejudice. In *Cuyler v. Sullivan*, 446 U.S., at 345-350, 100 S.Ct., at 1716-1719, the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. *In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties.* Moreover, it is difficult to measure *the precise effect on the defense of representation corrupted by conflicting interests.* Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts . . . it is reasonable for the criminal justice system to maintain a fairly rigid rule of *presumed* prejudice for conflicts of interest.

Because the effect of attorney disloyalty and lack of zealousness it is difficult to perceive or quantify, this Court has deemed it to be inappropriate to require a defendant to prove actual prejudice in order to be entitled to relief from conflict laden counsel. *Strickland, supra.* For the same reasons, it is inappropriate to apply the broad and general rule of *Morrison*, requiring a demonstration of prejudice by the defendant prior to dismissal for government invasion of the attorney/client relationship. When the government's intentional invasion of the attorney/client relationship results in counsel becoming disloyal to his client, the invasion is

palpably different from government surveillance of attorney/client communications, *viz. Weatherford v. Bursey*, 429 U.S. 545 (1977) or government degrading of an attorney in his client's eye, *viz. Morrison, supra.* Thus, when the government violates a defendant's right to counsel by intentionally and surreptitiously creating a serious conflict between the attorney and client, it creates such a substantial threat of prejudice that prejudice must be presumed. Therefore, the Court of Appeals erroneously applied *Morrison* and erroneously disregarded *Strickland's* reaffirmation of *Cuyler v. Sullivan*, 446 U.S. 335 (1980) in deciding that the defendant was not entitled to dismissal for violation of his Sixth Amendment privilege because there was no demonstrable prejudice.[3] This is a serious error in the legal reasoning in the opinion below. The Court of Appeals glossed over the major issue in the case—it does not matter what prejudice the defendant could prove. The error was fundamental and of far greater import than the incarceration of one defendant. No client should ever have to fear that his own lawyer intends to harm him for that lawyer's own personal gain.

3. The Court of Appeals relied strongly on the absence of demonstrable prejudice to the pending prosecution of defendant Ofshe in rejecting *both* the due process and right to counsel complaints of the petitioner. In its discussion of the Fifth Amendment claim, the Court noted:

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[3]It is important to note that *Strickland* was decided after *Morrison* and *Weatherford*. Thus, *Strickland* demonstrates that the presumption of prejudice for conflict laden counsel survived the *Morrison* ruling.

> Therefore, the invasion of the attorney/client relationship produced no evidence against Ofshe. More importantly, . . . Ofshe *was not prejudiced in his defense.* Had there been demonstrable evidence of prejudice, we would be compelled to reverse. (Emphasis in original.)

817 F.2d at 1516.

In this regard the Court of Appeals committed an error of law in rejecting the outrageous governmental misconduct claim under the Fifth Amendment. This requirement of prejudice as grounds for dismissal on Fifth Amendment due process claims is erroneous since "serious prosecutorial misconduct may so pollute a criminal prosecution as to require dismissal of the indictment . . . without regard to prejudice of the accused." *United States v. McCord,* 509 F.2d 334 (D.C. Cir. 1974). See also, *United States v. Crow Dog,* 532 F.2d 1182 (8th Cir. 1976).

> The dismissal of an indictment because of deliberate governmental misconduct is used as a prophylactic tool for discouraging future actions of the same nature. *Elkins v. United States,* 364 U.S. 206, 217, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960) . . .

United States v. Houghton, 554 F.2d 1219 (1st Cir. 1977).

CONCLUSION

This Court is therefore urged to accept this case in order to settle the important question of Federal law regarding the sanctions to be imposed for governmental misconduct in recruiting defense attorneys as confidential informants against their client and to correct the errors of law contained in the opinion of the Court of Appeals.

Respectfully submitted,

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Appendix

UNITED STATES of America,
Plaintiff-Appellee,

v.

Ronald Arthur OFSHE,
Defendant-Appellant.

No. 86-5351.

United States Court of Appeals,
Eleventh Circuit.

June 1, 1987.

After denial of a motion to suppress and a motion to dismiss in the United States District Court for the Southern District of Florida, No. 82-6129 CR-JAG, Jose A. Gonzalez, Jr., J., defendant entered a conditional plea of guilty and appealed from the order denying the motion to dismiss and to suppress evidence. The Court of Appeals, Atkins, Senior District Judge, sitting by designation, held that: (1) search warrant was properly issued and executed, notwithstanding that it did not mention informant's criminal record or incarceration, that it was directed to judge who issued warrant, and that it named only one business out of seven located in multiple use commercial buildings; (2) defendant was not prejudiced as to his representation by Government's placing of "body bug" on his attorney and surreptitiously monitoring conversation between attorney and defendant concerning investigation in Illinois, so that dismissal of case was not required; and (3) placing of "body bug" on attorney and surreptitiously

monitoring conversation with defendant was not so outrageous as to violate Fifth Amendment.

Affirmed.

1. Searches and Seizures —112

Insignificant and immaterial misrepresentations or omissions will not invalidate a search warrant. U.S.C.A. Const.Amend. 4.

2. Drugs and Narcotics —188

Omission of informant's six prior convictions and incarceration awaiting trial on charges of conspiracy to traffic methaqualone when purchase of cocaine was made at premises to be searched, when considered with all information contained in search warrant application, did not invalidate warrant; informant had furnished valuable information on at least 14 occasions during prior 12 years and, on each occasion, arrest and/or seizure occurred, and informant stated that he had been in office in question at least once a month for previous three years and that he had observed cocaine in one or both of two safes on each occasion. U.S.C.A. Const.Amend. 4.

3. Searches and Seizures —142

Search warrant can be executed by person to whom warrant is directed or by any officer authorized by law to execute search warrants. U.S.C.A. Const.Amend. 4.

4. Searches and Seizures —127

That search warrant was directed to United States District Judge who issued warrant, and that warrant commanded judge to search premises, was mere technicality and did not require invalidation of warrant. U.S.C.A. Const.Amend. 4.

5. Searches and Seizures —126

That warrant for search named only one business located in multiple use commercial building, which contained seven offices, did not require that warrant be voided; of seven offices in building, only one office was used by business separate from business listed in warrant, and agents followed exactly authority of warrant in that they searched only the two safes and the premises of the businesses listed in the warrant. U.S.C.A. Const.Amend. 4.

6. Indictment and Information —144.1(1)

Defendant was not prejudiced by Government's placing of "body bug" on his attorney and surreptitiously monitoring conversation between attorney and defendant in connection with Illinois investigation, so that dismissal of case was not required; nothing pertinent to Florida case against defendant was communicated to United States Attorney assigned to case, so that no Sixth Amendment violation occurred, and defendant's second attorney had no conflict of interest and provided effective representation at all times after prosecution was initiated. U.S.C.A. Const.Amend. 6.

7. Indictment and Information —144.1(1)

Defendant must be prejudiced before indictment may be dismissed for violation of attorney-client privilege. U.S.C.A. Const.Amend. 6.

8. Constitutional Law —257.5

To constitute constitutional violation, law enforcement technique must be so outrageous that it is fundamentally unfair and shocking to universal sense of justice mandated by due process clause of Fifth Amendment. U.S.C.A. Const.Amend. 5.

9. Constitutional Law —257.5

Government's conduct in invading communications between defendant and defendant's first attorney by placing "body bug" on attorney and surreptitiously monitoring conversation between defendant and his attorney regarding Illinois investigation was not so outrageous that it violated defendant's Fifth Amendment due process rights; no evidence was provided to Assistant United States Attorney prosecuting defendant in Florida action, and defendant's second attorney provided zealous representation so that defendant was not prejudiced in his defense; however, conduct of defendant's first attorney and United States Assistant Attorney was reprehensible. U.S.C.A. Const.Amend. 5.

Appeal from the United States District Court for the Southern District of Florida.

Before TJOFLAT and VANCE, Circuit Judges, and ATKINS*, Senior District Judge.

ATKINS, Senior District Judge:

After entering a conditional plea of guilty, Ofshe appealed from an order denying his motion to dismiss the Indictment and an order denying his motion to suppress evidence. We find that (a) appellant's constitutional rights were not violated by the government's misconduct, and (b) the motion to suppress was properly denied. Thus, we AFFIRM.

I. STATEMENT OF FACTS

On or about December 2, 1982, Agent Sternaman, Drug Enforcement Administration (DEA), applied to the Honorable Norman Roettger for a warrant to search the premises at 2216 S.W. 60th Terrace, Miramar, Florida.[1] Upon review, Judge Norman C. Roettger issued the warrant; unfortunately, it was also directed "To Honorable Norman C. Roettger, United States District Judge," and commanded him to search the premises within 7 days. On December 3, 1982, federal agents

*Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation

[1]After the warrant was issued, the agents learned that the premises were subdivided into separate offices containing unrelated businesses. However, all seven of the rooms shared a common entrance, a common receptionist, and a central mail delivery. Only one room was used by a tenant other than Fed-Aire or Appliance King. Moreover, the telephone in Ofshe's office was subscribed to by Fed-Aire of Florida, the business described in the search warrant.

executed a search based upon this warrant at 2216 S.W. 60th Terrace, Miramar, Florida, and found four and one-half pounds of cocaine in a safe located in appellant's office. Along with the cocaine, the agents found other drugs and certain documents which detailed appellant's drug trafficking. In addition, the agents found other evidence, outside the safe, throughout the office.

Agent Sternaman had no direct knowledge or information regarding any illegal activities on the premises. Instead, he relied upon information supplied to him by another agent, Special Agent Thomas L. Chapman, who worked for the North Carolina Office Bureau of Alcohol, Tobacco & Firearms (ATF). Like Sternaman, Agent Chapman had no direct knowledge of any illegal activities. Rather, this agent obtained information from an unnamed informant who informed Chapman that he had obtained an unspecified amount of cocaine from an unspecified person in an unspecified manner from an office inside the premises on an unspecified date.

Agent Sternamen's application for a search warrant failed to inform Judge Roettger that the confidential informant had six prior convictions and was incarcerated and awaiting trial on charges of conspiracy to traffic methaqualone. The government later disclosed the identity of the confidential informant, Junior Gambill, when he was to be utilized as a witness. This disclosure included a recitation of his prior felony convictions.

In December, 1982, appellant Ofshe was arrested in Miramar, Florida, for possession with intent to distribute cocaine. He retained the services of Mel

Black, Esquire, who handled the bond hearing, arraignment, initial discovery review and the preparation of a motion to suppress. Mr. Black still represents Ofshe.

In February, 1983, Ofshe retained Marvin Glass, Esquire, to act as co-counsel, and informed Black of his decision. Glass indicated that he would handle all communications with the government, including plea negotiations, and that Black would prepare the case for trial, and would investigate and file appropriate motions. This breakdown of duties was confirmed in a meeting between Black and Glass in March, although Black remained sole counsel of record until July 1, 1983.

Thereafter, while still acting as counsel for Ofshe, Glass contacted the United States Attorney's Office in Chicago, Illinois, and learned he was a target of the "Greylord"[2] investigation. Being keen to diminish his own criminal responsibility, Glass offered to provide information to and cooperate with the government in identifying and investigating suspected drug traffickers. Therefore, Glass periodically met with Assistant U.S. Attorney (AUSA) Turow to provide useful information about certain alleged criminal activities.

Later, on June 8, 1983, Glass mentioned Ofshe as a possible target during a meeting with Turow. When Glass indicated that he was currently representing Ofshe in Fort Lauderdale, Turow warned him not to

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[2]Operation "Greylord" refers to a federal investigation of corruption within the Cook County Circuit Court. *Chicago Courts Reel From Corruption Probe*, The National Law Journal, March 2, 1987, at 1, Col. 1.

reveal any privileged attorney-client conversations but encouraged him to proceed as an informant. Glass then began to detail activities regarding certain individuals, whom he had met through Ofshe, who discussed a money laundering scheme. In addition, Glass told AUSA Turow about Ofshe's request that Glass find a buyer for "a ton of marijuana."

AUSA Turow sought and received permission to place a Nagra body bug on Glass and conduct an electronic surveillance of the conversations between Glass and his client. These conversations included some unplanned discussions about his Florida case including the timing and likelihood of success of the motion to suppress. This electronic surveillance was done with Glass' consent while acting as Ofshe's attorney and as a "cooperating individual" for the government. To guard against improper conduct, AUSA Turow testified that the agents installing and monitoring the body tape were given very strict guidelines to instruct Glass not to violate any attorney-client privilege.[3]

Glass, of course, was not told at the time of the electronic surveillance that he had to withdraw from representation of Ofshe. Indeed, Glass was not told to withdraw for several months. Eventually, however, he was told to withdraw, but the United States Attorney did nothing to confirm his withdrawal or otherwise determine the status of the case. Significantly, the government did not file a motion to disqualify Glass or take any other action to inform the defendant of the

[3]The monitored conversation was conducted without approval of the United States Attorney's Office or the United States District Court in Miami, Florida.

conflict of interest, although it was aware of the conflict since June 8, 1983. Thus, the government allowed the ineffective representation to continue for over 10 months.

In February, 1984, Judge Gonzalez, who was presiding over Ofshe's case, learned that Glass had been enlisted as an informant against his client and ordered the United States Attorney to disclose this fact to the defendant. Glass appealed Gonzalez's decision and did not move to withdraw until April, 1984. Even then he continued to hide the fact that he was working as an informant, with governmental consent, until February, 1985. Since the court file was sealed, defendant Ofshe could not discover the reasons for Glass' withdrawal or about the appeal taken by Glass.

Although Black was prepared for trial in April of 1983, Glass instructed him to file a motion for continuance which was to include a waiver of speedy trial. Later, the day after Glass began giving information to the United States Attorney in Illinois, Glass had Ofshe execute a written formal waiver of speedy trial. At Glass' instructions, additional continuances and waivers of speedy trial were filed in May and June, 1983. Nevertheless, by July, 1983, both sides had announced at calendar call that they were ready for trial.

On June 28, 1983, the parties appeared at court before Judge Gonzalez for the actual trial. On that day, AUSA Hursey advised that he needed a few days to locate his witnesses. Glass and Hursey then left the courtroom and went into a private conference without

the presence of Ofshe or Black. During their private meeting, Glass convinced Hursey to dismiss the Indictment based on Glass' representation that Offshe would cooperate and provide the information. Glass further offered to waive reindictment and allow the government to file charges by Information. Subsequently, Hursey returned to the courtroom and moved for dismissal of the Indictment without prejudice. The motion was granted by the court.

As Glass, Ofshe, Black, and private investigator David Waters were leaving the Courthouse, they discussed various matters which required legal attention since Ofshe's case had been dismissed. Glass stated he would secure all property originally seized or given to secure the personal surety agreement, including an automobile that was in forfeiture. Based on that representation, Black did no further work on the forfeiture proceeding.

Later, the government reinstituted criminal proceedings against Ofshe. In August, 1983, Black received a Notice of Arraignment on an Information and called Glass who told him that would take care of it. Black then prepared a motion to dismiss the Information, but did not file it because Hursey told him that Glass had agreed to waive the filing of an Indictment.

Black testified he next appeared on December 9, 1983 at a sounding of the case for trial. He then spoke to Glass who told Black he would have another attorney appear at court. Neither Glass nor any other attorney appeared. Fortunately, the case was taken off the calendar and continued through February, 1984.

In February, 1984, the defense announced they were ready for trial, however, the case was not set for trial until March, 1985. Ofshe did not request any continuances from January, 1984 until March, 1985. His request for continuance from the March, 1985 trial setting was based upon problems in reassembling the dormant file, locating missing witnesses, discovering and investigating the reasons for Glass' *in camera* appeal from Gonzalez's order, and researching the grounds for the motion to dismiss.

Black first learned, on February 16, 1985, through a letter from Chief Assistant United States Attorney Joseph McSorley that Glass was a government informant and had worn a body bug during his conversations with his client, Ronald Ofshe, on June 14, 1983. Naturally, Black was concerned. Ofshe was also concerned.

AUSA Turow testified in detail about the procedures employed to assure there would be no violation of any attorney-client privilege. He stated that he and his superiors discussed the matter fully as soon as they learned that Ofshe's counsel, Glass, was "keen on diminishing his criminal resonsibility" and wanted to become a "cooperating individual," and was willing to provide information regarding Ofshe's criminal activities. Turow also testified that by June 10, 1983, the United States Attorney in Illinois had given government agents very strict instructions that Glass was to follow based on the attorney-client privilege. The agents were to transmit these guidelines to Glass.

Apparently, as the agents were wiring Glass for his undercover conversation with Ofshe, Glass said that the

case against Ofshe had been dismissed. After June 1983, contact between Glass and the United States Attorney's Office in Illinois was sporadic, but in August of 1983 Glass told the agents that the case had been reinstated and that he still represented the defendant. At this time, Turow felt obliged to inform the United States Attorney in the Southern District of Florida of the situation. However, the United States Attorney for the Southern District of Florida and his chief assistants decided not to reveal these matters to the prosecutor, Hursey.

II. DISCUSSION

Although appellant relies upon several independent theories to challenge his conviction, this appeal generally concerns two. First, was the search warrant properly issued and executed? Second, does the government's use of a criminal defense attorney as an informant warrant the reversal of appellant's conviction?

A. *The Search Warrant*

1. *The Sufficiency of the Application for the Search Warrant*

Ofshe argues that the agents omitted critical information from the search warrant application. Specifically, the application for the search warrant did not mention the criminal record of the informant nor did it state that he was in federal custody when the purchase of cocaine was made at the premises to be searched. Ofshe argues that these omissions were "either intentional or with reckless disregard for the

truth." For these reasons, he urges that doubt is cast on the existence of probable cause, and that the district court should have invalidated the search warrant.

Appellant overlooks the critical fact that the search warrant affidavit was based on the personal observations of a reliable informant. When Agent Chapman communicated the informant's observations to Agent Sternaman, the affiant, Chapman, described the informant as a proven, reliable informant who had furnished valuable information on at least 14 occasions during the past twelve years. On each occasion, an arrest and/or seizure occurred. The informant stated that he had been in the office in question at least once a month for the previous three years and that he had observed cocaine in one or both of the two safes on each occasion. The informant further stated that, sixteen days before (November 16, 1982), he had observed a multi-kilogram quantity of cocaine in a safe located at the address in question and had obtained cocaine from Ofshe for his own use.

[1, 2] Insignificant and immaterial misrepresentations or omissions will not invalidate a warrant. *See Franks v. Delaware,* 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). Before issuing a search warrant, the judge must "make a practical, common sense decision . . ., given all the circumstances set forth in the affidavit . . ., [that] there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates,* 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1982). The reviewing court must then examine the situation and determine that the issuing judge "had a 'substantial

basis for . . . conclud[ing]' that probable cause existed." *Id.* at 238-39, 103 S.Ct. at 2332-33 (*quoting Jones v. United States,* 362 U.S. 257, 271, 80 S.Ct. 725, 736, 4 L.Ed.2d 697 (1960)). Here, it was the past, credible dealings over a twelve year period with Agent Chapman. In addition, the informant's statements were based on his personal knowledge. He recited having received cocaine from Ofshe for his personal use. This fact, combined with this further statement that he had seen cocaine in Ofshe's safes once a month for the previous three years, told the district court enough about the informant's background. Therefore, the omission of the informant's criminal convictions and incarceration, when considered with all the information contained with the application, does not invalidate the warrant. *See United States v. Harrington,* 761 F.2d 1482, 1484-85 (11th Cir.1985); *United States v. Strauss,* 678 F.2d 886, 893 (11th Cir.), *cert. denied,* 459 U.S. 911, 103 S.Ct. 218, 74 L.Ed.2d 173 (1982).

2. *The Failure to Direct the Warrant to a Civil Law Enforcement Official and its Issuance by the Same Person Designated to Execute the Warrant*

Ofshe argues that the search warrant was invalid because it was issued by and directed to the Honorable Norman C. Roettger, United States District Judge, for execution. Ofshe also asserts that the warrant violated the Constitutional requirements of the Fourth and Fifth Amendments because Judge Roettger was not a "neutral and detached magistrate." We disagree.

[3, 4] The designation of the issuing judge to execute the warrant was obviously inadvertent. A search warrant can be executed by the person to whom

a warrant is directed or to any officer authorized by law to execute search warrants. *United States v. Martin,* 600 F.2d 1175, 1181-82 (5th Cir. 1979). Federal agents, including the affiant, DEA Agent Robert Sternaman, executed the warrant. The defect in the search warrant was a mere technicality and does not require this court to invalidate the warrant. *See United States v. Soriano,* 482 F.2d 469, 478-80 (5th Cir.1973), *modified in other respects,* 497 F.2d 147 (1974) *(en banc); see also United States v. Burke,* 517 F.2d 377 (2d Cir.1975). The errors assailed were those of form, not of substance. Thus, the district court was correct in holding that these defects did not invalidate the warrant.

3. *Description of Premises.*

[5] "The Warrant Clause of the Fourth Amendment categorically prohibits the issuance of any warrant except one 'particularly describing the place to be searched and the persons to be seized.' " *Maryland v. Garrison,* ____ U.S. ____, 107 S.Ct. 1013, 1017, 94 L.Ed.2d 72 (1987). In this case the "premises" which were to be searched were described in the search warrant as:

> Appliance King, Division of Fed-Air of Florida, Inc., located at 2216 S.W. 60th Terrace, Miramar, Florida, a two-story concrete, and masonry building, white in color, and its contents, including two safes, each being four feet by four feet.

Appellant contends that this description was insufficient, and that the district court should have

voided the warrant because it named only one business located in a multiple use commercial building. Again, we disagree.

> An erroneous description of premises to be searched does not necessarily render a warrant invalid. The Fourth Amendment requires only that the search warrant describe the premises in such a way that the searching officer may " 'with reasonable effort ascertain and identify the place intended.' "

United States v. Burke, 784 F.2d 1090, 1092 (11th Cir.1986) (citation omitted).

The district court found that the agents learned only after the warrant was issued that the premises described in the warrant were subdivided into separate offices and the record supports this conclusion. Although the agents had looked at the outside of the building on December 2, 1983, they did not actually enter the building until December 3, 1983, when they executed the warrant. The layout of the office space supports the agents' confusion. Of the seven offices in the building, six were used by Fed-Aire, Appliance King or appellant. Only one office was used by a separate business. When the agents executed the search warrant, they found that there was a single, locked entrance to the premises. The locked door was controlled by a single receptionist, who answered the telephone for all the offices. The mail was also received centrally and distributed to each office. Thus, the agents reasonably believed, until they entered the premises, that the office space belonged solely to Appliance King/Fed-Aire. Moreover, during the search, there appeared to be a connection between Ofshe and

Wayne Steinberg, who identified himself to the agents as the owner of the building.[4]

In the final analysis, the agents followed exactly the authority of the warrant in that they searched only the two safes and the Appliance King Division of Fed-Aire of Florida, Inc. premises. Their actions were reasonable. Thus, we cannot invalid the warrant for the reason presented. *See e.g., Garrison,* 107 S.Ct. at 1019.

B. *The Government's Use of Criminal Defense Counsel as an Informant*

Ofshe asserts that he was prejudiced by the invasion of his attorney-client relationship. He also vehemently argues that the government's conduct in this case was so utterly outrageous that it warrants dismissal of the Indictment. Because of the gravity of this situation, we have carefully examined appellant's serious contentions.

1. *The Invasion of the Attorney-Client Privilege*

Ofshe forcefully argues that his expectation of privacy was violated and his attorney-client privilege was invaded; therefore, he insists that his Indictment should have been dismissed. He argues that he was generally prejudiced because the government encouraged Glass to act in his own interest at the

[4]When the agents entered appellant's office, they found that the safes mentioned in the warrant were locked. The agents called a locksmith to drill open the safes. When the locksmith arrived, he asked Steinberg to save him a lot of work and give the agents the combination to the safes. Steinberg told the locksmith not to talk to him and walked away.

expense of his client, creating an obvious conflict of interest. More specifically, he points out that the government placed a body bug on his attorney and surreptitiously monitored a conversation which included discussion concerning future criminal activity and discussions regarding his pending court case.

Ofshe insists that the infringement of his attorney-client privilege or his right to counsel automatically requires the dismissal of his Indictment. Yet, in *United States v. Morrison*, 449 U.S. 361, 101 S.Ct. 665, 66 L.Ed.2d 564 (1981), the Supreme Court squarely held that absent demonstrable prejudice, dismissal was plainly inappropriate as a remedy for such a Sixth Amendment violation. Here, we find no demonstrable prejudice.

[6] During the recorded conversation, the only information related to the pending case concerned the motion to suppress which was part of this public record. No additional specific facts in the case or strategic decisions were discussed. In fact, Ofshe's verbatim recital in his brief confirms this conclusion. Significantly, nothing pertinent to the Florida case was communicated to the United States Attorney assigned this case. Thus, since no information was furnished AUSA Hursey as a result of the intrusion, no Sixth Amendment violation occurred. *Weatherford v. Bursey*, 429 U.S. 547, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977).

[7] Other cases emphasize the fact that a defendant must be prejudiced before an Indictment may be dismissed. For example, *United States v. Melvin*, 650 F.2d 641 (5th Cir.1981) is instructive. There, the court

reversed a district court order dismissing an Indictment because of a government informant's attendance at meetings between defendant and his counsel at which defense strategy had been discussed. The *Melvin* court held that the district court could not dismiss the Indictment without first finding that the intrusion into appellee's attorney-client relationship had prejudiced the ability of appellee's attorneys to provide adequate representation or otherwise prejudiced his defense. If prejudice was found, the district court was ordered to make a determination as to whether some other remedy short of dismissal could be tailored to vindicate appellee's Sixth Amendment right to counsel and a fair trial.

In *United States v. Sander*, 615 F.2d 215 (5th Cir.), *cert. denied*, 449 U.S. 835, 101 S.Ct. 108, 66 L.Ed.2d 41 (1980), police officers examined an attorney's confidential files on defendant's case following the attorney's murder. No injury or prejudice resulted because nothing in the file was utilized by the prosecution. Therefore, the court in *Sander* held that the appropriate remedy for such an intrusion is to suppress any evidence unlawfully obtained, rather than dismiss the case. *Sander*, 615 F.2d at 219.[5]

We reiterate and emphasize that Ofshe suffered no prejudice as a result of the taped conversation. The taped conversation produced no tainted evidence, and the intrusion into any potentially privileged attorney-client matters was not purposeful. In short, no information was

[5]Here, the issue of suppression is irrelevant as none of the statements recorded was to be used to prove the government's case.

provided to the prosecuting attorney. Similarly, while Ofshe claims that he was also prejudiced by waiving, at Glass' direction, his right to dismissal under the Speedy Trial Act, he overlooks the fact that original and supplemental motions to suppress and other motions were filed in his behalf by Black which tolled the running of the speedy trial clock until they were heard. *See Henderson v. United States*, ___ U.S. ___, 106 S.Ct. 1871, 1874, 90 L.Ed.2d 299 (1986). Likewise, the government stipulated to the testimony of any unavailable defense witnesses. Finally, we note that appellant was not prejudiced in this case because Black had no conflict of interest and provided zealous representation at all times after prosecution was initiated. Regardless of Glass' poor performance, Black was not prevented from acting in Ofshe's best interest. Thus, we hold that the district court properly denied Ofshe's Motion to Dismiss.

2. *Outrageous Government Conduct Claim Under the Fifth Amendment*

[8] Ofshe argues that the government's conduct in invading the communications between him and Glass was so outrageous that it violated his Fifth Amendment due process rights. *Hampton v. United States*, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976); *United States v. Russell*, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973). To constitute a constitutional violation the law enforcement technique must be so outrageous that it is fundamentally unfair and "shocking to the universal sense of justice mandated by the Due Process Clause of the Fifth Amendment." *Russell* at 432, 93 S.Ct. at 1643. In determining whether such conduct exists, the "totality of the circumstances" must be considered "with

no single factor controlling." The defense is to be invoked only "in the rarest and most outrageous of circumstances." *United States v. Haimowitz*, 725 F.2d 1561, 1577 (11th Cir.), *cert. denied*, 469 U.S. 1072, 105 S.Ct. 563, 83 L.Ed.2d 504 (1984), *quoting United States v. Tobias*, 662 F.2d 381, 387 (5th Cir.1981), *cert. denied*, 457 U.S. 1108, 102 S.Ct. 2908, 73 L.Ed.2d 1317 (1982). *See also United States v. Mulherin*, 710 F.2d 731, 735 (11th Cir.1983), *cert. denied*, 464 U.S. 964, 104 S.Ct. 402, 78 L.Ed.2d 343 (1984). Moreover, in *Hampton*, the court indicated that . . . a demonstrable level of outrageousness warranting dismissal would be especially difficult to show in contraband offenses "which are so difficult to detect in the absence of undercover government involvement." *Hampton* at 495 n. 7, 96 S.Ct. at 1653 N. 7.

[9] After considering the totality of the circumstances presented in this case, we hold that the actions of the government were not so outrageous as to "shock the universal sense of justice." Therefore, the district court's denial of the motion to dismiss is affirmed. In reaching this decision, however, we must stress two points. First, our holding is based upon the unique facts of this case. Second, we do not condone the government's use of criminal defense attorneys as informants against their clients.[6]

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[6]While we have not found the government's conduct sufficiently outrageous to warrant the dismissal of his Indictment, we do believe that Glass' and Turow's conduct was reprehensible. Because the district judge is more familiar with the attorneys' conduct, we assume he will refer this matter to The Attorney Registration and Disciplinary Commission, 203 N. Wabash, Suite 1900, Chicago, Illinois 60601, for appropriate action.

The facts show that the investigation was initiated by the Chicago office and that no evidence was provided to the Miami Assistant U.S. Attorney prosecuting Ofshe. Glass' offer to help the Chicago office was designed to obtain information regarding Ofshe's subsequent criminal conduct and not used to discover defense strategy in the Florida case. Therefore, the invasion of the attorney-client relationship produced *no evidence against Ofshe.* More importantly, because Black provided zealous representation, Ofshe *was not prejudiced in his defense.* Had there been demonstrable evidence of prejudice, we would be compelled to reverse.[7]

III. CONCLUSION

Several aspects of this case concern us. The evidence against Ofshe should have been easily obtained. Instead, the bungled search warrant procedures created unnecessary difficulties. Furthermore, the conduct and judgment exhibited by some of the attorneys were questionable at best. Yet, the conduct at trial, by Black, Hursey, and Judge Gonzalez, was quite credible and ensured that Ofshe was provided with a fair trial.

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[7] In addition, appellant, argues that he was also prejudiced by "waiver of forfeiture proceedings" and "change in precedents concerning search and seizure." We agree with the magistrate in the Review and Recommendation, affirmed and adopted by the district court:

> The defendant's allegations concerning waiver of forfeiture proceedings and change in precedents relating to search and seizure are without merit. The forfeiture issue is not relevant to this case and a change in precedents is speculative and fails to set forth sufficient reasons to support dismissal.

After reviewing the law and applying it to the unique facts presented in this case, we find that the district court correctly denied the motion to suppress and the motion to dismiss. Therefore, WE AFFIRM.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 82-6129-Cr-GONZALEZ

UNITED STATES OF AMERICA

vs.

RONALD OFSHE

REVIEW AND RECOMMENDATION

THIS CAUSE is before the Court on Motion to Dismiss filed by the defendant, Ronald Ofshe. At hearing, certain factual issues were resolved by the testimony of former Assistant United States Attorney Michael Hursey; Assistant United States Attorney Scott Turow of the Northern District of Illinois; Federal Bureau of Investigation Special Agent Robert Gibson III; secretary to Mel Black, Gail Allen; private investigator William David Waters and attorney Mel Black.

The record and testimony revealed that in December of 1982, the defendant was arrested in Miramar, Florida, and he retained the services of Mel Black, Esq., who handled the bond hearing, arraignment, initial discovery review and the preparation of a motion to suppress.

The testimony revealed further that in February of 1983, the defendant retained Marvin Glass, Esq., to act as co-counsel. As Mr. Black testified:

> Glass indicated that he was going to handle all communications with the Government, including plea negotiations, and that Mel Black was to continue preparing the case, doing the investigation and working on motions. . . . This breakdown of duties was confirmed in a meeting between Black and Glass in March. . . .

Subsequently, according to the Assistant United States Attorney then assigned the case, Michael Hursey, Esq., Mr. Glass and Mr. Black met with Mr. Hursey to discuss a plea negotiation, and the conversation was directed to alleged defects in the search warrant as opposed to the question of the defendant's cooperation with the Government.

Assistant United States Attorney Scott Turow testified, essentially, that while acting as counsel for the defendant in the instant case, Mr. Glass contacted the United States Attorney's Office in Chicago, Illinois and, being "keen to diminish his own criminal responsibility", Mr. Glass offered to provide information to and cooperate with the Government.

The defendant first was mentioned by Mr. Glass as a possible target on June 8, 1983 when, during a meeting with Assistant United States Attorney Scott Turow, Mr. Glass told Mr. Turow that he represented a defendant in Fort Lauderdale. Mr. Glass then began to detail activities relating to some persons in North Carolina who he had met through the defendant and who spoke to Mr. Glass about a money laundering scheme and of the defendant's request that Mr. Glass find a buyer for "a ton of marijuana."

At this juncture, Mr. Turow sought and received permission to place a Nagra body bug on Mr. Glass and conduct an electronic surveillance of the conversations between Mr. Glass and his client, the defendant, Ronald Ofshe. These conversations included minimal unplanned discussions about his Florida case. This electronic surveillance was done with the consent of Mr. Glass who was acting as Mr. Ofshe's attorney and as a "cooperating individual" for the Government.

Assistant United States Attorney Scott Turow testified that the agents installing and monitoring the body tape were given very strict guidelines to instruct Mr. Glass not to violate any attorney-client privilege. The monitored conversation was conducted without approval of the United States Attorney's Office or the United States District Court in Miami, Florida. However, approval had been obtained from the United States Attorney of the Northern District of Illinois for the electronic surveillance in Miami. As Mr. Black points out in his Supplemental Memorandum in Support of his Motion to Dismiss.

> The body bug recorded the entire conversation regardless of whether the conversation was about the suspected future criminal activity or about the pending case against Ofshe. No precautions were taken to prevent or minimize the surveillance and recording of privileged attorney/client communications about the instant pending case. . . . The Government knew that Marvin Glass was acting as Ofshe's attorney at the time of the body recording but

> decided to proceed regardless. The Agent listened to the tape and learned it contained a strategy discussion of Ofshe's case. Glass was not told at the time of the electronic surveillance that he had to withdraw from representation of Ofshe. Glass was not told to withdraw for several months. Even after he was told to withdraw, the U.S. Attorney did nothing to confirm his withdrawal or to otherwise follow the status of the Ofshe case. The Government did not file a motion to disqualify Glass or take other action to inform the defendant of the conflict of interest. The Government had been aware of the conflict of interest since June 8, 1983, but allowed the ineffective representation to continue for over 10 months. Glass did not move to withdraw until April, 1984 as counsel for Ofshe and even then continued to hide the real reason for withdrawal, with Governmental consent, until February, 1985. The Court file was sealed . . . the Defendant Ofshe could not learn the reasons for withdrawal by Glass or about the appeal taken by Glass to overturn the Court's order to disclose to the Defendant the actions of Glass and the Government.

The testimony from hearing also reveals that although Mr. Black was prepard for trial in April of 1983, Mr. Glass instructed him to file a Motion for Continuance which was to include a waiver of speedy trial. Mr. Glass later had the defendant execute a written formal waiver of speedy trial which was done the day after Mr. Glass began giving information to the United States Attorney in Illinois.

At Mr. Glass' instructions, additional continuances and waivers of speedy trial were filed in May and June, 1983, and by July, 1983, both sides had announced at calendar call that they were ready for hearing on a pre-trial motion and for trial.

On June 28, 1983, the parties appeared at Court before Judge Gonzalez for the actual trial. On that day, Mr. Hursey advised that he needed a few days to get his witnesses. Mr. Glass and Mr. Hursey then left the courtroom and went into a private conference without the presence of the defendant or Mr. Black. Subsequently Mr. Hursey returned to the courtroom and moved for dismissal of the Indictment without prejudice. The motion was granted by the Court.

Mr. Hursey testified at hearing that in the above private meeting Mr. Glass convinced him to dismiss the Indictment and promised that the defendant shortly would be able to provide the information and cooperation that Mr. Glass had promised. Mr. Glass further offered to waive re-indictment and allow the Government to file charges by Information.

According to the witnesses at hearing, as Mr. Glass, the defendant, Mr. Black and private investigator David Waters were leaving the Courthouse, Mr. Glass stated he was going to "take care of" obtaining return of all property seized or given to secure the personal surety agreement, including an automobile that was in forfeiture. Based on that representation, Mr. Black testified he did no further work on the forfeiture.

In August of 1983, Mr. Black received a Notice of Arraignment on an Information and called Mr. Glass who told him that Mr. Glass would take care of the problem. Mr. Black prepared a Motion to Dismiss the Information, but he did not file it when Mr. Hursey told him that Mr. Glass had agreed previously to waive the filing of an Indictment. Thus, it appeared that Mr. Glass was continuing to make the decisions about strategy and tactics in the case.

Mr. Black testified he next appeared on December 9, 1983 at a sounding of the case for trial. He then spoke to Mr. Glass by telephone who told Mr. Black not to worry about the sounding as he would take care of it by having another attorney appear. Neither Mr. Glass nor any other attorney appeared, but the case was taken off the calendar and continued through January, 1983 and February, 1984.

In February of 1984, Mr. Black, now sole trial counsel, announced ready for trial. (Mr. Black had received a motion to withdraw from Mr. Glass in April of 1984.) The case was not set for trial after February, 1984, until March, 1985. The defendant did not request any continuances from January, 1984 until March, 1985. According to the testimony, the request for continuance from the March, 1985 trial setting was owing to problems in re-assembling the dormant file, locating missing witnesses and discovering and investigating the reasons for the *in camera* appeal by Mr. Glass and the grounds for the instant Motion to Dismiss.

Mr. Black first learned, on February 16, 1985, in a letter from Chief Assistant United States Attorney Joseph McSorley that Mr. Glass was a Government informant and had worn a body bug during his conversations with his client, Ronald Ofshe, on June 14, 1983.

Assistant United States Attorney Scott Turow testified in detail about the lengths they went to to assure there would be no violation of any attorney-client privilege. He assured the Court that he and his superiors discussed the matter fully as soon as they learned, in June of 1983, that the Florida defendant, Ronald Ofshe, was a possible target of the Illinois investigation and that Ofshe's counsel, Mr. Glass, was "keen on diminishing his criminal responsibility" and wanted to become a "cooperating individual." Mr. Turow testified that by June 10, 1983, the United States Attorney in Illinois had given Government agents very strict instructions that Mr. Glass was to follow in order to avoid violating any attorney-client privilege, and the agents were to transmit these guidelines to Mr. Glass. Apparently, as the agents were wiring Mr. Glass for his undercover conversation with the defendant, Mr. Glass said that the case against Mr. Ofshe had been dismissed. After June of 1983, contact between Mr. Glass and the United States Attorney's Office in Illinois was sporadic and, in August of 1983, when Mr. Glass told the agents that the case had been reinstated and Mr. Glass still represented the defendant, Mr. Turow felt obliged to tell the United States Attorney in the Southern District of Florida of what had happened. When the information relative to all the events regarding Mr. Glass, Mr. Ofshe and Mr. Glass' cooperation were related, the United

States Attorney for the Southern District of Florida and his chief assistants decided not to reveal these matters to the prosecutor, Mr. Hursey.

In sum, therefore, by August of 1983, Mr. Glass was cooperating with the United States Attorney in Illinois and snitching against his client, Mr. Ofshe, while not telling his co-counsel, Mr. Black, about his conflict or his activities. Mr. Glass did not file a Motion to Withdraw until nearly nine months later—in April of 1984. In the meantime, the right hand of the Government (the Illinois branch) was very busy trying to conduct undercover business in south Florida without letting the left hand of the Government (the South Florida branch) know what it was doing. When the right hand finally had to confront the left hand, they apparently decided to try to wash both hands and wipe the resulting grime on a towel to be put into a sealed hamper that neither the defendant nor the prosecutor nor even the defendant's local counsel could see into.

RECOMMENDATIONS OF LAW

The defendant alleges prejudice owing to gross Government misconduct and, citing to *United States v. Russell*, 411 U.S. 423 (1973), contends that the cumulative effect of the many alleged abuses by the Government mandates that the court impose the ultimate sanction of dismissal. The defendant cites the Court to a catalogue of abuses:

1. Waiver of speedy trial and exclusion of time from April 21, 1983 through February 28, 1985.

2. Deprival of counsel of choice.

3. Governmental informant directing defense case, strategy and tactics.

4. Governmental informant being privy to defense strategy and tactics.

5. Waiver of forfeiture proceedings.

6. Change in the precedents concerning search and seizure.

7. Government overheard attorney/client conversations.

In support of point one, waiver of speedy trial, the defendant asserts that Marvin Glass was responsible for

> directing a waiver of speedy trial and procuring unnecessary continuances. Obviously Glass sought the delays of Ofshe's case so he could keep Ofshe available as a bargaining chip. When Glass directed the continuance of April 21, 1983, May, 1983, and June 21, 1983, he had already assumed the role of government agent, and he was not continuing the case for the benefit of the client but in order to keep the case pending so he could offer Ofshe as a target of investigation.

Thus, the defendant contends, Mr. Glass caused the defendant to waive his right of dismissal for the Government's failure to bring him to trial within the time limited specified by statute.

However, in examining the facts of the case, as the Government points out in its Response:

> Dismissal with prejudice under Title 18, United States Code, Section 3162(a)(2) is absolutely inapplicable. Assuming arguendo their [sic] was a violation of the Act, the factors of seriousness of the offense, facts leading to dismissal and impact of re-prosecution on the administration of justice militate against such an order. Most importantly, their [sic] exists no prejudice respecting the defendant from any delay. The previous argument that prejudice resulted from witnesses who were made unavailable has been resolved through government stipulation to their testimony . . . . As with nearly every government prosecution, this case has not gotten better with time; it has only gotten older and memories have weakened. This is prejudice to the government—not the defendant.

In point two of his argument, the defendant contends that he has been denied the right to the effective assistance of conflict-free counsel. From this Court's perspective, the defendant is absolutely correct, and had this situation continued through trial and the defendant been convicted, he would most likely be able to remedy the conviction on Petition for Writ of Habeas Corpus.

In such a case, the law is clear and unchallenged. In *Zuck v. Alabama*, 588 F.2d 436, 439 (5th Cir.), *reh'ng denied* 591 F.2d 102 (5th Cir.), *cert. denied* 444 U.S. 833 (1979), the Fifth Circuit said:

> If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists. The interests of the other client are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client.

Thus, it has long been held that prejudice need not be shown where an actual conflict of interest is demonstrated by the defendant. *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *United States v. Alvarez*, 696 F.2d 1307 (11th Cir.), *cert. denied* ____ U.S. ____ 103 S.Ct. 1878 (1983). Although a conflict may cause a defendant's attorney's performance to fall below Sixth Amendment standards, not all conflicts are so egregious as to rise to a Sixth Amendment violation. *Westbrook v. Zant*, 704 F.2d 1487 (11th Cir. 1983). Most recently, courts have firmly ruled that actual, not speculative, conflict must be shown by the presentation of particularized instances of conflicting interests and such must be established as a constitutional predicate before the federal courts will entertain consideration of this claim of ineffective assistance of counsel. *United States v. Ard*, 731 F.2d 718 (11th Cir. 1984); *Barham v. United States*, 724 F.2d 1529 (11th Cir.), *cert. denied* ____ U.S. ____, 104 S.Ct. 2687 (1984).

As the Government sets forth in its Response:

> Invasion of the attorney-client relationship does not mandate dismissal of an indictment. *United States v. Morrison*, 449 US 361, 101 S.Ct. 665 (1981); *Weathford v. Bursey*, [sic] 429 US 545, 97 S.Ct. 837 (1977); *United States v. Melvin*, 650 F.2d 641 (5th Cir. 1981). The remedy must depend upon the impact in the criminal proceeding. Where, as herein, no evidence is to be used in the prosecution and no information is relayed to the prosecuting authority, there is nothing to remedy. In light of *Morrison*, where it was held the drastic remedies of dismissal or suppression would not apply absent a showing of prejudice, the *Melvin* court fashioned the guidelines used herein. The defendant must show how his representation or defense was prejudiced. *Melvin* at 644. Then, only if prejudice is shown, should the court determine what remedy short of dismissal may vindicate the defendant's Sixth Amendment rights to counsel and a fair trial. This is balanced with the public's interest in seeing the guilty brought to justice. *Ibid.* . . .
>
> Regardless of what occurred during Glass' participation as co-counsel, each decision was sanctioned not only by the defendant himself but also co-counsel, Mel Black (see T26 and T31, where defendant was present for conversations with Hursey). The only pleading filed by Glass, a motion to continue for July 25,

1983, indicates he was retained on March 29, 1983. All other motions and pleadings were filed by co-counsel, Black. The true nature of Ofshe's representation by attorneys Black and Glass as it respects the waiver of his speedy trial rights or continuances is unknown in that Black and Ofshe have maintained their attorney-client privilege (See T132-134, 141-142).

Attorney Mel Black has been appearing, without interruption, for defendant Ofshe, since day one of this prosecution. Attorney Black was sole counsel of record until July, 1983. Attorney Black has been sole counsel of record subsequent to April, 1984.

The testimony of attorney Black attempted to place a barrier between case preparation on his part and case negotiation by Glass. This division of authority, as recognized by Mr. Black, did not prevent him from acting in the defendant's best interests in filing motions to continue the case (T138, 140). Whatever the private arrangement was as to who made the decisions, it was clear that the defendant, as well as attorney Black, was consulted (T31). . . .

The defendant next argues that by monitoring Mr. Glass' conversations with the defendant, the defendant's expectation of privacy was violated to such a degree as to justify dismissal of the case. The defendant contends that

[t]here is an enhanced privacy interest underling the attorney/client relationship which warrants a heightened degree of judicial protection and supervision when attorney/client conversations are the subject of electronic surveillance. In the instant case the electronic surveillance was conducted at the whim and fancy of the agents without benefit of court order, judicial supervision or protection. . . .

In the instant case the prosecution intentionally overhead the conversations about the pending case which the defendant had every right to believe were privileged. The government deliberately invaded Ofshe's privileged relationship with his attorney, infiltrated the defense by planting an informant and intercepted communications between an attorney and his client.

The conduct of the government has prejudiced the Defendant by the very destruction of his relationship with this attorney. The government action turned tradition on its head and made it impossible for Ronald Ofshe to ever rely upon the secrecy of his attorney communication or the loyalty of his counsel. If the governmental invasion and subversion of the attorney/client relationship which occurred in this case is sanctioned, there will be a chilling effect on the Sixth Amendment.

Even if the defendant's assertions are true, the relief available to the defendant would be suppression of the statements the defendant made to Mr. Glass. *United States v. Morrison*, 449 U.S. 361 (1981); *United States v. Sander*, 615 F.2d 215 (5th Cir. 1980). In addition, as the Government has stated, it does not intend to use any of these statements. See, *United States v. Sander, id.*

Clearly the Government's actions were ill-advised, but they do not appear to have been deliberate attempts to infringe on or destroy the defendant's attorney-client relationship with Mr. Glass. The Government attempted to avoid any breaches of the attorney-client privilege by issuing instructions and guidelines to Mr. Glass before the consensual monitoring of Mr. Glass' conversation with the defendant. Apparently the Government overestimated Mr. Glass' ability to take instructions and/or underestimated the extent to which Mr. Glass would go to diminish his criminal responsibility in the eyes of the Government. Regardless of how this situation is viewed, the defendant has not suffered any actual articulable prejudice so great as to violate his due process rights nor were the Government's acts so heinous as to warrant dismissal. Without a doubt, the Government was anxious to obtain information from a putative defendant (Mr. Glass) who appeared to have valuable information to give and, with a shining example of tunnel-vision, bumbled ahead without thinking through to the possible consequences should Mr. Glass not follow their instructions. But, as the Government presents in its Response:

> Grabbing at straws, the defendant states the "government has prejudiced the defendant by the very destruction of his relationship with his attorney." This is a reversion to the *per se* dismissal argument rejected by the Supreme Court in *Morrison* and this circuit in *United States v. Melvin*, 650 F.2d 641 (5th Cir. 1981). The argument also ignores the fact that the pre-existing attorney-client relationship with Mel Black has continued to this date. The record is clear that Black has remained conflict-free and vigorously defended the defendant.

The defendant's allegations concerning waiver of forfeiture proceedings and change in precedents relating to search and seizure are without merit. The forfeiture issue is not relevant to this case and a change in precedents is speculative and fails to set forth sufficient reasons to support dismissal.

In fact, these last two arguments are but minor complaints in the defendant's litany of alleged abuses which, together, he concludes amounts to Government misconduct so outrageous as to violate his due process rights.

The defendant is absolutely accurate when he states:

> As noted in a decision of the Eleventh Circuit, Government involvement in criminal schemes can be so outrageous that it offends due process. *See U.S. v. Tobias*, 662 F.2d 381 (5th Cir. 1981) (Unit B), *cert. denied*, 457 U.S. 1108, 102 S.Ct. 2908, 73 L.Ed.2d 1317 (1982); *see also Hampton v. U.S.*, 425 U.S. 484, 492-93.

> Furthermore, "[s]erious prosecutorial misconduct may so pollute a criminal prosecution as to require dismissal of the indictment . . . without regard to prejudice of the accused." *United States v. McCord*, 509 F.2d 334 (D.C. Cir. 1974). See also *United States v. Crow Dog*, 532 F.2d 1182 (8th Cir. 1976).
>
> The granting of a dismissal for Government misconduct is designed to maintain public confidence in the administration of justice. *United States v. Taylor*, 648 F.2d 565 (9th Cir. 1981). "The dismissal of an Indictment because of deliberate Government misconduct is used as a prophylactic tool for discouraging future actions of the same nature. *Elkins v. United States*, 364 U.S. 206, 217, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960) . . ." *United States v. Houghton*, 554 F.2d 1219 (1st Cir. 1977).

A careful examination of the facts in this case, taken singly and as a whole, offends this Court. The Government's actions affront the dignity of the law and the high purpose of law enforcement. What the Government did and the method used to fulfill their purpose, was at times half-baked, certainly not well-planned, clearly improperly supervised and undoubtedly ill-omened. Mr. Glass' actions were deceptive, unctuous but, for him, expedient.

However, even under the harshest light, the Government's actions do not so prejudice the defendant or "shock the conscience" of the Court as to warrant

dismissal of the case. *United States v. Russell, supra; United States v. Mulherin*, 710 F.2d 731 (11th Cir. 1983); *United States v. Kelly*, 707 F.2d 1460 (D.C. Cir. 1983); *United States v. Savage*, 701 F.2d 867 (11th Cir. 1983); *United States v. Capo*, 693 F.2d 1330 (11th Cir. 1982); *United States v. Gianni*, 678 F.2d 956 (11th Cir. 1982); *United States v. Nicoll*, 664 F.2d 1308 (5th Cir.), *cert. denied* 457 U.S. 1118 (1982); *United States v. Tobias*, 662 F.2d 381 (5th Cir.), *cert. denied* 457 U.S. 1108 (1982); *United States v. Ryan*, 548 F.2d 782 (9th Cir.), *cert. denied* 429 U.S. 939 (1976).

DONE AND SUBMITTED at Fort Lauderdale, Florida, this 20 day of November, 1985.

/s/ PATRICIA JEAN KYLE
UNITED STATES MAGISTRATE
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Supreme Court, U.S.
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No. 87-407

In the Supreme Court of the United States

OCTOBER TERM, 1987

RONALD ARTHUR OFSHE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General
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QUESTION PRESENTED

Whether a prosecutor's use of an attorney as an informant against his client with respect to planned future crimes unrelated to a pending criminal indictment against the client requires dismissal of the pending indictment in the absence of any prejudice.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	6
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Cuyler v. *Sullivan*, 446 U.S. 335 (1980)	6
Strickland v. *Washington*, 466 U.S. 668 (1984)	6
United States v. *Cintolo*, 818 F.2d 980 (1st Cir. 1987)	7
United States v. *DeLucca*, 630 F.2d 294 (5th Cir. 1980), cert. denied, 450 U.S. 983 (1981)	7
United States v. *Kelly*, 749 F.2d 1541 (11th Cir.), cert. denied, 472 U.S. 1029 (1985)	7
United States v. *Morrison*, 449 U.S. 361 (1981)	5, 6
United States v. *Russell*, 411 U.S. 423 (1973)	7
United States v. *Vaughn*, 797 F.2d 1485 (9th Cir. 1986)	7
Weatherford v. *Bursey*, 429 U.S. 545 (1977)	7

Constitution and statute:

U.S. Const. Amend. VI	5, 6, 7
21 U.S.C. 841(a)(1)	1

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-407

RONALD ARTHUR OFSHE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-23) is reported at 817 F.2d 1508. The magistrate's recommendation (Pet. App. 24-41), which was adopted by the district court, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 1987. A petition for rehearing was denied on July 9, 1987. The petition for a writ of certiorari was filed on September 8, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On a conditional guilty plea entered in the United States District Court for the Southern District of Florida, petitioner was convicted of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was

sentenced to four years' imprisonment and a four year special parole term. The court of appeals affirmed (Pet. App. 1-23).

1. On December 3, 1982, federal agents executing a search warrant at petitioner's office found four-and-one-half pounds of cocaine as well as other drugs and notebooks detailing petitioner's drug dealings (Pet. App. 5-6). Petitioner was arrested and indicted later that month. He retained local attorney Mel Black to represent him at the initial hearings, to prepare a motion to suppress the seized evidence, and to serve as his trial counsel. In February 1983 petitioner also retained Chicago attorney Marvin Glass to assist in his defense, with the understanding that Glass would handle all matters involving communications with the prosecutors, including negotiations relating to a possible plea agreement. *Id.* at 7. Both sides agreed to continuance of the trial to enable the plea discussions to progress, and petitioner waived his speedy trial rights (*id.* at 27-28).

In mid-April 1983, Glass learned that he was a target in the unrelated "Greylord" investigation, an investigation by federal authorities in Chicago into corruption in the Cook County, Illinois, judicial system. Anxious to reduce his own potential criminal liability, Glass offered to provide information to and cooperate with federal investigators, and he met periodically with Assistant United States Attorney Scott Turow of the Northern District of Illinois to give information on various illegal activities of which he had knowledge. Pet. App. 7. On June 8, 1983, Glass told Turow about petitioner, whom he identified as a client in a pending criminal action in Fort Lauderdale. While warning Glass not to reveal privileged communications to the government, Turow encouraged Glass to provide non-privileged information concerning petitioner's criminal activities. Glass told Turow about other individuals he had met through petitioner who discussed setting up a money

laundering scheme. Glass also told Turow that petitioner had asked Glass to help find a buyer for a ton of marijuana. *Id.* at 7-8. Glass subsequently consented to wear a body recorder and tape-record a conversation with petitioner, under strict instructions that he not discuss attorney-client matters, including defense strategy in the case in which Glass was representing petitioner. Glass told the FBI agents who fitted him with the body recorder that the criminal case against petitioner had been dismissed but that he expected that petitioner would later be reindicted. *Id.* at 11-12. Glass met with petitioner on June 14, 1983. The ensuing conversation that Glass taped did not contain any privileged information: it addressed primarily a proposed marijuana transaction and, although passing reference was made to the filed motion to suppress, there was no discussion of defense strategy. *Id.* at 18. Glass did not continue to act as an informant against petitioner after that date (*id.* at 30).

2. Prosecutors in the Southern District of Florida were not informed in June that Glass was acting as an informant against his client during his legal representation of petitioner. Contrary to what Turow and the FBI agents were led to believe in June, the government did not move to dismiss the indictment until late July 1983. The government moved to dismiss at that time to permit the completion of a plea agreement that would obligate petitioner to cooperate with the government, without the need to seek further continuances of the trial. Pet. App. 28.[1] In August 1983 a superseding information was filed against petitioner (*id.* at 29).[2]

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[1] The magistrate's opinion mistakenly cites the date of the dismissal as June 28, 1983. The correct date was July 28, 1983. See Oct. 8, 1985 Tr. 17-18.

[2] In January 1984 it appeared that the cooperation agreement would not materialize, and when petitioner threatened to move to dismiss the information, the government obtained a superseding indictment (Oct. 8, 1985 Tr. 23-24).

When Turow learned in August 1983 that the charge had been reinstated, he told the United States Attorney for the Southern District of Florida about Glass's earlier cooperation against petitioner (Pet. App. 12). To avoid any possibility of tainting the prosecutor assigned to petitioner's case, the United States Attorney did not advise the prosecutor about Glass's cooperation (*ibid.*). Shortly thereafter, Turow informed Glass that he could not continue to represent petitioner (Feb. 17, 1984 Tr. 5-6). Despite Turow's repeated instructions to Glass, Glass did not withdraw from the representation of petitioner (Pet. App. 6; Oct. 8, 1985 Tr. 70). As a result, Turow and an Assistant United States Attorney from Florida met with the district judge and told him of the situation in February 1984, so that the court could consider disqualifying Glass itself (Feb. 17, 1984 Tr. 1-13). The court agreed that Glass could not stay in the case and that petitioner should be informed of the facts (Feb. 17, 1984 Tr. 11).[3] Glass, however, did not move to withdraw from petitioner's defense until April 1984 (Pet. App. 29), and petitioner was not told of the reason for his withdrawal until the government sent his other attorney an explanatory letter in February 1985 (*id.* at 11).

3. Following the revelation of Glass's cooperation with the government, petitioner moved to dismiss the indictment based upon government misconduct. After an evidentiary hearing, a federal magistrate recommended that the district court deny that motion, as well as petitioner's motion to suppress the evidence uncovered during the warrant-authorized search. After setting out the facts (Pet. App. 24-31), the magistrate recommended rejection of petitioner's contention that he was prejudiced by Glass's informant activities. The magistrate noted that if the

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[3] Glass appealed the district court order directing that petitioner be told what had occurred. The court of appeals affirmed.

government had recorded any prejudicial statements on the body recorder, petitioner's remedy would be suppression of the statements (*id.* at 38). She also found that the government's actions, though "ill-advised, * * * do not appear to have been deliberate attempts to infringe on or destroy the defendant's attorney-client relationship with Mr. Glass" (*ibid.*). The magistrate rejected petitioner's other specific claims of prejudice that he alleged arose from the tainted attorney-client relationship. Finally, the magistrate concluded that, although "[a] careful examination of the facts in this case, taken singly and as a whole, offends this Court" (*id.* at 40), the government's conduct did not so prejudice petitioner or so "shock the conscience" of the court as to warrant dismissal of the prosecution (*id.* at 40-41). After an evidentiary hearing, the district court affirmed the magistrate's findings, adopted her recommendations (see *id.* at 22 n.7), and denied both motions.

4. The court of appeals affirmed. The court noted that since no information from the tape-recorded conversation was conveyed to the prosecutor or otherwise used against petitioner, no Sixth Amendment violation resulted from the intrusion into potentially privileged attorney-client communications. Pet. App. 18. It then found that petitioner was not prejudiced in any way by the intrusion or by Glass's continued representation. Citing this Court's decision in *United States* v. *Morrison*, 449 U.S. 361 (1981), the court concluded that the absence of prejudice made dismissal an inappropriate remedy (Pet. App. 18-20). Finally, in a decision explicitly limited to "the unique facts of this case" and without condoning what had occurred, the court agreed that the government conduct was "not so outrageous as to 'shock the universal sense of justice' " (*id.* at 21). The court specifically noted that the invasion of the attorney-client relationship produced no evidence against petitioner. Moreover, in light of the zealous representation

provided petitioner by Black, his principal attorney, there was no evidence that petitioner had been denied his right to a competent defense (*id.* at 22).[4]

ARGUMENT

Petitioner contends (Pet. 8-12) that the government conduct at issue here was an outrageous violation of his right to counsel and requires dismissal of the indictment. There are two problems with that argument. First, petitioner does not claim to have been prejudiced in any respect by the government's actions, and this Court has clearly held that dismissal is not an appropriate remedy for a Sixth Amendment violation absent some showing of prejudice. *United States* v. *Morrison*, 449 U.S. 361, 364-365 (1981).[5]

Second, both courts below examined the facts and correctly stopped short of concluding that the government conduct at issue here was outrageous. There is nothing

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[4] The court of appeals also affirmed the district court's refusal to suppress evidence that was seized in the warrant-authorized search. Petitioner does not challenge the court of appeals' decision on that issue.

[5] *Strickland* v. *Washington*, 466 U.S. 668 (1984), upon which petitioner relies, is not to the contrary. In that case, the Court noted that a defendant convicted after a trial in which " 'an actual conflict of interest adversely affected his lawyer's performance' " may be entitled to a reversal without having to make the full showing of prejudice required in other contexts. *Id.* at 692 (quoting *Cuyler* v. *Sullivan*, 446 U.S. 335, 350 (1980)). But petitioner is not merely seeking a reversal of his conviction. He is seeking a dismissal of the indictment. Furthermore, petitioner is not even suggesting that he was "adversely affected" by Glass's representation. Both the district court and the court of appeals found that Glass's role as an informant did not affect his representation of petitioner on the charges brought in this case. Petitioner does not dispute those findings, but argues instead only that the government's conduct "create[d] such a substantial threat of prejudice that prejudice must be presumed" (Pet. 11). *Strickland* provides no support for that position.

inherently outrageous in using as an informant a co-conspirator who happens to be the target's defense attorney, so long as there is no attempt to intrude into a protected attorney-client relationship and no intrusion results. It is not unknown for attorneys to engage in criminal conduct with or on behalf of their clients, and a law enforcement investigation of either or both parties does not automatically infringe a constitutionally protected relationship. See, *e.g.*, *United States* v. *Cintolo*, 818 F.2d 980, 1005 (1st Cir. 1987); *United States* v. *Vaughn*, 797 F.2d 1485, 1488-1489, 1492 (9th Cir. 1986); *United States* v. *Kelly*, 749 F.2d 1541, 1551 (11th Cir.), cert. denied, 472 U.S. 1029 (1985); *United States* v. *DeLucca*, 630 F.2d 294, 301 (5th Cir. 1980), cert. denied, 450 U.S. 983 (1981).

To be sure, it is not usual that an attorney and co-conspirator becomes an informant against his client. But if there is good reason to believe that the attorney is not currently engaged in the representation of his client on a pending charge or that a particular conversation between the two will touch on nothing but joint future crimes, and if the attorney is careful and under strict instructions to avoid intruding into attorney-client or defense strategy matters, treating the attorney like a cooperating co-conspirator does not " 'shock[ ] * * * the universal sense of justice' " (*United States* v. *Russell*, 411 U.S. 423, 432 (1973) (citation omitted)). And where the investigation does not produce any tainted evidence or influence in any way the ongoing prosecution—indeed, where the prosecutor does not even know of the cooperation—there is no resulting Sixth Amendment violation. Cf. *Weatherford* v. *Bursey*, 429 U.S. 545 (1977).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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CASE NO. 87-407

in the Supreme Court of the United States

OCTOBER TERM, 1987

RONALD ARTHUR OFSHE

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals, Eleventh Circuit

REPLY BRIEF OF PETITIONER

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QUESTIONS PRESENTED

I.

WHETHER IT IS OUTRAGEOUS GOVERNMENT MISCONDUCT WHEN A PROSECUTOR USES A DEFENSE ATTORNEY AS A CONFIDENTIAL INFORMANT AGAINST HIS CLIENT WHILE THE DEFENSE ATTORNEY IS REPRESENTING THAT CLIENT IN A PENDING CRIMINAL PROSECUTION

II.

WHETHER PREJUDICE SHOULD BE PRESUMED WHEN THE INVASION OF THE ATTORNEY/CLIENT RELATIONSHIP CONSISTS OF THE GOVERNMENT CREATING A CONFLICT BY TURNING A DEFENSE ATTORNEY INTO A GOVERNMENT INFORMANT AGAINST HIS OWN CLIENT

TABLE OF CONTENTS

	Page
Questions Presented	i
Argument	2
Conclusion	4

CASE NO. 87-407

in the

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United States

OCTOBER TERM, 1987

RONALD ARTHUR OFSHE

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals, Eleventh Circuit

REPLY BRIEF OF PETITIONER

ARGUMENT

The Respondent's Brief assumes that there was no intrusion into the attorney-client relationship between the Petitioner and his criminal defense attorney who was used by the Government as an informant against the Petitioner.[1] The Court of Appeals for the Eleventh Circuit has recently issued an order which seems to refute this assumption. (The unpublished order is included herein as an Appendix.) The order denied a motion of Scott Turow to amend the panel opinion in *United States v. Ofshe,* 817 F.2d 1508 (11th Cir. 1987). Turow, the former Assistant United States Attorney in the Northern District of Illinois, directed the actions of Marvin Glass while Glass was simultaneously defending the Petitioner on pending criminal charges and working as an informant against the Petitioner. Turow sought to amend the panel opinion of the Court

[1]The Respondent's Brief argues that "[t]here is nothing inherently outrageous in using as an informant a co-conspirator who happens to be the target's defense attorney, so long as there is no attempt to intrude into a protected attorney-client relationship and no intrusion results." (Brief of Respondent at 6-7).

of Appeals by deleting a footnote which described Turow's action as "reprehensible."[2]

In its order denying Turow's motion to amend the panel opinion, the Court of Appeals found that the prosecutor's action in permitting the defense attorney to become an informant against his client did in fact intrude into the attorney-client relationship by rendering the attorney ineffective.[3]

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[2]The panel opinion stated at 817 F.2d 1516, n. 6:

> While we have not found the government's conduct sufficiently outrageous to warrant the dismissal of his Indictment, we do believe that Glass' and Turow's conduct was reprehensible. Because the district judge is more familiar with the attorneys' conduct, we assume he will refer this matter to The Attorney Registration and Disciplinary Commission, 203 N. Wabash, Suite 1900, Chicago, Illinois 60601, for appropriate action.

[3]The Court of Appeals order found:

> In this case, the foreseeable result of Turow's conduct was that Glass' representation of Ofshe would be rendered ineffective. Indeed, Turow's own testimony reveals that he subjectively foresaw that very result. Turow testified that when he obtained permission for the electronic surveillance, his understanding was that Glass "was going to have to complete this and then withdraw from representing Ofshe." Thus Turow understood when he formulated the plan to monitor Ofshe's conversation with Glass that **the direct effect of the scheme would be to destroy Glass' effectiveness as counsel.** (App. 11).

The Respondent's reliance upon the Magistrate's finding that the government's actions "do not appear to have been deliberate attempts to infringe on or destroy the defendant's attorney-client relationship with Mr. Glass" is clearly misplaced in view of the recent finding by the Court of Appeals. (Brief of Respondent at 5).

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Appendix

[DO NOT PUBLISH]

[FILED NOV 16 1987]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-5351

D.C. Docket No. 82-6129

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RONALD ARTHUR OFSHE,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(November 16, 1987)

Before TJOFLAT and VANCE, Circuit Judges, and ATKINS*, Senior District Judge.

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*Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

BY THE COURT:

Scott F. Turow has moved this court to amend its panel opinion in *United States v. Ofshe,* 817 F.2d 1508 (11th Cir. 1987), *petition for cert. filed,* 56 U.S.L.W. 3195 (U.S. Sept. 29, 1987) (No. 87-407), so as to remove what he contends is an inappropriate reference to his conduct in the events underlying that case. We deny the motion.

In *Ofshe,* the defendant, Ronald Ofshe, had been indicted on drug charges in the Southern District of Florida. He sought dismissal of the indictment on the ground that his attorney, Marvin Glass, had acted as a government informant against him during the pendency of his case. Movant Turow, then an Assistant United States Attorney in the Northern District of Illinois, was the government official to whom Glass had tendered his services as an informant. This panel held that the sixth amendment did not require dismissal of Ofshe's indictment because Ofshe had not suffered demonstrable prejudice as a result of Glass' informant activities. We also held that Turow's conduct was not sufficiently outrageous to require dismissal of Ofshe's indictment on due process grounds. We nonetheless observed in a footnote that Glass and Turow had engaged in reprehensible conduct and that disciplinary action might be appropriate. This footnote, which Turow now asks us to delete, reads as follows:

> While we have not found the government's conduct sufficiently outrageous to warrant the dismissal of his Indictment, we do believe that Glass' and Turow's conduct was reprehensible.

> Because the district judge is more familiar with the attorneys' conduct, we assume he will refer this matter to The Attorney Registration and Disciplinary Commission, 203 N. Wabash, Suite 1900, Chicago, Illinois 60601, for appropriate action.

Ofshe, 817 F.2d at 1516 n. 6.

In his motion requesting us to strike the footnote, Turow argues that the issue of his ethical responsibilities as a prosecutor was never before the court. He concludes that the *Ofshe* panel violated his due process rights by "delivering [a] public censure . . . without notice to him that the ethical propriety of his conduct was under scrutiny and without permitting him to be heard."

I.

We reject Turow's arguments.[1] The reference to which he objects was made in connection with our determination that Turow's conduct was not sufficiently outrageous to warrant dismissal of Ofshe's indictment

[1]Turow was not a party to the proceedings below. Therefore, we view his present motion only as a request by a stranger to those proceedings, not as part of an Article III case or controversy. We do not comment on whether a remedy would be available to Turow in the context of a properly instituted adversarial proceeding.

on due process grounds. In making that determination, we engaged in a thorough review of the record on appeal. In light of the due process issue presented, our review by necessity focused specifically on Turow's conduct. It is therefore specious for Turow now to argue that his conduct was never an issue in the case.[2]

In his motion requesting us to amend the panel opinion, Turow seeks to justify his conduct by

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[2]In his motion to amend the opinion, Turow states that "[a]t no time before the issuance of this Court's opinion was it suggested by the United States Magistrate who heard Mr. Turow's testimony . . . that Mr. Turow may have violated any ethical precepts." In fact, the magistrate strongly condemned Turow's conduct. After describing the nature of Turow's contacts with Glass, the magistrate concluded with the following observation:

> [T]he right hand of the Government (the Illinois branch) was very busy trying to conduct undercover business in south Florida without letting the left hand of the Government (the South Florida branch) know what it was doing. When the right hand finally had to confront the left hand, they apparently decided to try to wash both hands and wipe the resulting grime on a towel to be put into a sealed hamper that neither the defendant nor the prosecutor nor even the defendant's local counsel could see into.

In the magistrate's view, "[w]hat the Government did and the method used to fulfill their purpose, was at times half-baked, certainly not well-planned, clearly improperly supervised and undoubtedly ill-omened." In oral argument before this court, the Government did not dispute the magistrate's characterization of Turow's conduct. Indeed, the Government stated that "[w]e agree—we have no problem with the magistrate's ruling on this in which she said it was horrible and nasty and all that. I can assure you we will try not to have it happen again."

emphasizing that it resulted in no violation of Ofshe's constitutional rights. We find this argument to be specious as well. Surely Turow cannot seriously contend that a prosecutor's conduct is immune from attack on ethical grounds so long as it is not so outrageous as to rise to the level of a due process violation.

Finally, we reject outright the notion that a federal court cannot comment as it sees fit on the ethical shortcomings of the attorneys who practice before it. The footnote to which Turow objects is very similar to the closing comment by the Supreme Court in *United States v. Morrison,* 449 U.S. 361, 101 S.Ct. 665 (1981). In that case, the Supreme Court concluded that a prosecutor's invasion of the defendant's attorney-client relationship did not warrant dismissal of the defendant's indictment. The Court noted, however, that "[i]n arriving at this conclusion, we do not condone the egregious behavior of the Government agents. Nor do we suggest that in cases such as this, a Sixth Amendment violation may not be remedied in other proceedings." *Id.* at 367, 101 S.Ct. at 669. Like the Supreme Court in *Morrison,* we are not inhibited from commenting on the misconduct of federal prosecutors, especially when that misconduct underlies a central issue in the case. Thus we stand by our view that disciplinary action may be in order. As we stated in our panel opinion, we defer that decision to the appropriate authorities.

II.

While we are troubled by the ethical ramifications of Turow's conduct, our concern runs deeper. Based on the record before us, we believe that Turow may have

committed an obstruction of justice in violation of 18 U.S.C. § 1503 (1982).

A.

The facts of the case are recited in the panel opinion. Ofshe was arrested and indicted in Florida in December 1982 for possession with intent to distribute cocaine. Immediately after his arrest, Ofshe retained the services of Mel Black, who acted as counsel throughout the proceedings before the district court. In December 1982, Ofshe hired Marvin Glass to serve as co-counsel. Black and Glass agreed that Black would prepare the case for trial while Glass would handle all communications with the government, including plea negotiations.

In early April 1983, having learned that he was the target of an investigation by the United States Attorney's Office in the Northern District of Illinois, Glass approached investigators in that office and offered his services as an informant. Thereafter, beginning on April 19, 1983, Glass periodically met with Assistant United States Attorney (AUSA) Scott F. Turow of the Chicago office and provided him with information concerning suspected drug traffickers.

The details of Glass' contacts with Turow were brought to light at the hearing held in connection with Ofshe's motion to dismiss. Although he was aware that Glass was an attorney, Turow testified that he did not know about Glass' involvement in the Ofshe case until June 8, 1983. At a meeting on that date with Turow, Glass mentioned Ofshe as a possible target, and informed Turow that he was representing Ofshe in the

case pending in the Southern District of Florida. Turow nonetheless encouraged Glass to continue as an informant, although he cautioned him not to reveal the content of any privileged communication with Ofshe. Glass proceeded to tell Turow about a money-laundering scheme involving persons he had met through Ofshe; Glass also told Turow that Ofshe had sought his help in locating a buyer for a large quantity of marijuana. Turow and Glass then discussed the possibility of planting a Nagra body bug on Glass in order to monitor conversations between Glass and Ofshe.

On June 10, 1983, after consulting with superiors in Chicago, Turow decided to proceed with the plan to monitor Ofshe's conversations with Glass. Sometime between June 10 and June 14, federal agents contacted Glass and elicited his consent to the plan. Turow testified that the agents were told to give Glass strict instructions not to violate the attorney-client privilege during the monitored conversation.

Glass, equipped by federal agents with a body bug, met with Ofshe on June 14, 1983. Their monitored conversation contained no discussion of Ofshe's pending prosecution other than references to matters that were part of the public record. The entire surveillance occurred without the approval or knowledge of AUSA R. Michael Hursey, the prosecutor handling Ofshe's case in the Southern District of Florida.

Turow testified that Glass had been told before June 14 that he would have to withdraw as Ofshe's counsel in the pending case once the surveillance was over. Glass remarked to the federal agents who wired him

for the surveillance that the case against Ofshe had been dropped. The agents relayed that remark to Turow, who apparently accepted it as true. In any event, Turow did not pursue the matter of Glass' withdrawal at that time.

In fact, the case pending against Ofshe had not been dropped. Between April 19, 1983, the date of the first meeting between Glass and Turow, and June 14, 1983, the date of the electronic surveillance, the trial of the case was continued on two occasions. The first motion for continuance was filed on April 22, 1983 by co-counsel Black, who testified that the motion "was prepared . . . in response to the call that Mr. Glass had made to my office . . . wherein Mr. Glass told my secretary that we should move for a continuance . . . based upon continuing plea negotiations," which apparently were being handled by Glass. The motion contained a waiver of speedy trial which, according to Black, was also included pursuant to Glass' instructions. The district court granted the motion on April 25, and reset the case for the trial calendar commencing May 31, 1983.

On June 2, 1983, the district court ordered a second continuance at the joint request of the parties. In its order, the court stated that the purpose of the continuance was to enable the parties to complete plea negotiations. The court reset the case for the trial calendar commencing June 27, 1983.

Black testified that Glass telephoned him on June 21, 1983, one week after the electronic surveillance, with instructions to file yet another motion for continuance. Black filed the motion on June 22, 1983. This motion, like the two earlier motions, stated that

the defendant needed more time to complete plea negotiations. The district court granted the motion on June 23, 1983, and reset the case for the trial calendar commencing July 25, 1983.

On July 28, 1983, the parties finally appeared in court for trial. Glass and AUSA Hursey, conferring out of the presence of Ofshe and Black, reached an agreement whereby Hursey would request dismissal of the indictment in exchange for Ofshe's promise to provide information to the government. Glass also advised Hursey that if the government decided to reinstitute proceedings against Ofshe at a later date, Ofshe would waive indictment and submit to trial on an information. Hursey thereupon moved the district court to dismiss the indictment without prejudice, and the court granted the motion.

Proceeding by an information based on the charges contained in the December 1982 indictment, the Government reinstituted criminal proceedings against Ofshe on August 12, 1983. Glass continued to represent Ofshe, notwithstanding his earlier promise to Turow that he would withdraw. Turow testified that he did not learn that Glass was still representing Ofshe until August 30, 1983. At that time, Turow contacted Glass and instructed him to withdraw. Glass resisted, and continued to resist in spite of further communications from Turow reminding him of his earlier commitment to withdraw once the electronic surveillance had been completed.

Meanwhile, the district court, still unaware of Glass' informant status, continued the trial of the case until

February 1984. In February 1984, Turow disclosed the matter to the district judge in an in camera hearing. Glass then filed a motion in the district court requesting the court to enforce a purported agreement between Turow and Glass whereby Turow had promised Glass complete confidentiality. The district court denied the motion, and this court affirmed. *In re Anonymous,* No. 84-5540 (11th Cir. Feb. 27, 1985) (per curiam). Glass ultimately withdrew as Ofshe's counsel on April 13, 1984. Because the court file for *In re Anonymous* was sealed, neither Ofshe nor Black knew Turow's in camera disclosure to the district court, why Glass had taken the appeal, or why Glass had withdrawn. Black and Ofshe did not learn of Glass' informant activities until February 16, 1985, when Black was alerted to the matter by a letter from Joseph McSorley, Chief Assistant United States Attorney in the Southern District of Florida.

B.

The three elements of a section 1503 offense are that "the accused (1) corruptly or by threats, (2) endeavored, (3) to influence, obstruct, or impede the due administration of justice." *United States v. Silverman,* 745 F.2d 1386, 1392 (11th Cir. 1984). The kinds of conduct prohibited under section 1503 includes any "corrupt conduct capable of producing an effect that prevents justice from being duly administered, regardless of the means employed." *Id.* at 1393. With respect to the scienter element, "[t]he government is not required to prove . . . that the defendant harbored the specific purpose of obstructing the due administration of justice; all the government has to establish is that

the defendant should have reasonably foreseen that the natural and probable consequence of the success of his scheme would achieve precisely that result." *Id.*

In this case, the foreseeable result of Turow's conduct was that Glass' representation of Ofshe would be rendered ineffective. Indeed, Turow's own testimony reveals that he subjectively foresaw that very result. Turow testified that when he obtained permission for the electronic surveillance, his understanding was that Glass "was going to have to complete this and then withdraw from representing Ofshe." Thus, Turow understood when he formulated the plan to monitor Ofshe's conversation with Glass that the direct effect of the scheme would be to destroy Glass' effectiveness as counsel.

In light of his understanding of the matter, Turow could anticipate that his conduct would result in one of three scenarios. In the first scenario, Glass immediately moves the district court to permit him to withdraw as Ofshe's counsel. Glass, however, does not reveal to the court the true reason for his seeking to withdraw, and instead proffers some fabricated reason. The court, accepting the fabricated reason on its face but finding it insufficient to justify withdrawal, denies the motion. Ofshe never learns of Glass' informant activities. Thus, the ineffective assistance for which Turow shares responsibility is perpetuated. In effect, Turow and Glass are responsible for an involuntary waiver by Ofshe of his right to the effective assistance of counsel. Corruptly coercing a defendant to waive a constitutional right during a judicial proceeding violates section 1503. *See Silverman,* 745 F.2d at 1394.

The second scenario is like the first, except that Glass reveals to the court the full truth about his informant activities and the court grants the motion to withdraw. The court then conducts an examination of co-counsel Black to determine whether his representation is also defective. If the court finds that it is, trial of the case will be delayed while Ofshe obtains new counsel. Further, Ofshe might seek to have his indictment dismissed on sixth amendment or due process grounds. These events would burden the court and cause an expenditure of scarce resources that would not otherwise have occurred. We believe that this is the kind of burden to the administration of justice that Congress sought to prevent with section 1503.

In the third scenario, Turow instructs Glass to withdraw but Glass resists doing so. Believing that he can optimize his own position with the government by continuing to pump information from Ofshe, he seeks to delay Ofshe's trial as long as possible. He repeatedly moves the district court to continue the case, each time citing some fabricated reason. The court grants the continuances. Glass eventually does withdraw as counsel, but after the case finally goes to trial, Ofshe learns of Glass' informant activities and seeks to have his indictment dismissed. Again, these events singularly and collectively waste scarce judicial and parajudicial resources and impede the due administration of the court's calendar.

In our opinion, the three scenarios illustrate that Turow should have reasonably foreseen that the natural and probable consequence of the success of his scheme to monitor Ofshe's conversations with Glass would be

to impede the due administration of justice in violation of section 1503. When a federal court becomes aware of conduct that may be criminal, it is duty bound to alert the appropriate authorities. Accordingly, we direct the Clerk to forward a copy of this order to the United States Attorney for the Southern District of Florida, since the conduct described herein occurred within his district.